

# PIKE & LUSTIG, LLP

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WINTER  
2022

At the Florida law firm of Pike & Lustig, LLP, we have the ability and focus to provide the kind of personalized attention that you may not receive from other firms, where you're only a number. We have the experience and resources necessary to provide the highest quality of representation so that our business and personal injury clients feel our team is fighting for them. Our aggressive and sophisticated-litigation style will assist clients in achieving their goals.



## The Evolution of The Florida Summary Standard: One- And One-Half Years Later

*By Timothy P. O'Neill, Attorney, Pike & Lustig LLP*

Historically, business litigation lawyers may have preferred to file in federal court for the regimented docket and the summary judgment standard. Summary Judgment motions in Federal court were more likely to be granted. A Summary Judgment can be an effective tool to bring a business litigation matter to an early end. Effective May 2021, Florida adopted part of the Federal summary judgment standard under FRCP 56. However, despite Florida's adoption of the new summary judgment rule, Florida Rule 1.510 and Federal Rule 56 differ. Recent appellate decisions examined these differences under Florida law's summary judgment standard.

### A. The Previous Florida Rule on Summary Judgment-A High Bar

Florida's previous summary judgment rule was similar to the Federal Rule. However, Florida case law interpreting the prior rule made it more difficult to obtain summary judgment. See, e.g., *Corbitt v. Kuravilla*, 745 So. 2d 545

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(Fla. 4th DCA 1999) (appellate courts must draw every possible inference in favor of a non-movant for summary judgment). This has created a situation where appellate courts will not affirm a summary judgment unless all inferences in opposition to summary judgment have been negated. An example is the early case of Skaf's Jewelers, Inc. v. Antwerp Import Corp., 150 So. 2d 260, 261 (Fla. 2nd DCA 1963), where the Court stated: "If there is an issue of fact and the slightest doubt remains, summary judgment should not be granted." In other words: it was the burden of the party seeking summary judgment to prove their case and disprove any of the other party's defenses beyond any doubt. The order on a motion summary judgment often states one word, "Denied." The Florida courts were not obligated to explain the denial. Practically speaking, it was easier and safer for a possible appeal to deny a motion for summary judgment.

## **B. The Burden of Proof Changes on Summary Judgment in Florida**

In *Wilsonart, LLC v. Lopez*, 308 So. 3d 961, 964 (Fla. 2020), Florida has adopted the summary judgment standard articulated by the U.S. Supreme Court in the *Celotex* Trilogy of cases, also known as the "Celotex" Standard, for granting summary judgments. Under the *Celotex* Standard, the burden of proof in summary judgment proceedings is on the same party who would bear the burden of proof at trial. This new standard means that Defendant must prove its affirmative defenses. No longer must the moving party disprove the affirmative defenses. In re Amendments to Florida Rule of Civil Procedure 1.510, SC20-1490 at \*7 (Fla. Apr. 29, 2021), the nonmovant has the burden to prove its case beyond a directed verdict standard. The correct test for the existence of a genuine factual dispute is no longer "the slightest doubt" being raised by the nonmovant but whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (quoting *Anderson*, 477 U.S. at 248).

Last, under the new rule, the court may not simply grant or deny a Summary Judgment; it must provide an order explaining its rationale. The new Rule 1.510(a) says that the court "shall" state on the record "its reasons for granting or denying a summary judgment motion." To comply with this mandatory requirement, the court must do more than "make a conclusory statement that there is or is not a genuine dispute as to a material fact". Indeed, the court must provide enough specificity "to provide useful guidance to the parties." There is no such requirement of federal judges under FRCP 56.

## **C. The 2022 Case Law**

The Court Must Comply With The New Rule 1.510(a)

In *Jones v. Ervolino*, 393 So.3d 473, 474-5 (Fla. 3d DCA 2022), the Court stated the requirements of trial courts under Rule 1.510(a) when granting or denying a motion for summary judgment. The lower Court granted summary judgment stating: "Kathryn Ervolino's Motion for Summary Judgment is granted. Bernard

Jones' amended petition for testate administration and imposition of a constructive trust is respectfully denied." *Id.* The Ervolino Court reversed when it ruled:

Where federal rule 56(a) says that the court should state on the record its reasons for granting or denying a summary judgment motion, new rule 1.510(a) says that the court shall do so. The wording of the new rule makes clear that the court's obligation in this regard is mandatory." In re Amends. to Fla. R. of Civ. P. 1.510, 317 So. 3d at 77 (emphasis added).

The newly amended language of the rule also makes clear the court shall state on the record the reasons for granting or denying the motion. (emphasis added). "To comply with this requirement, it will not be enough for the court to make a conclusory statement that there is or is not a genuine dispute as to a material fact. The court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review." In re Amends. to Fla. R. of Civ. P. 1.510, 317 So. 3d at 77., a mere pronouncement the court has granted or denied such a motion fails to comply with the rule as it does not contain reasons for granting or denying the motion.

*Ervolino*, 393 So.3d at 475.

*Ervolino* clarifies that denying a motion for summary judgment without explanation is no longer a viable alternative in the State of Florida. This rule is beneficial. The purpose of filing a motion for summary judgment is multifaceted. Even if you don't win a summary judgment, filing the same: (1.) educates the court about your case before trial, and (2.) ostensibly forces your opponent to lay their cards on the table.

With the addition of Rule 1.510(a), a litigant will gain insight into the court's assessment of your case. This insight can be an invaluable tool for fine-tuning your case for trial and facilitating settlement.

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## **It's the Most Dangerous Time of the Year**



The period between Thanksgiving until the end of the year is one of the most dangerous times to be on the road. Based on figures from the National Highway Traffic Safety Administration,

an average of 36 alcohol-related traffic fatalities occurred every day in the United States during the five-year period that was examined between 2013-2018. However, this figure rose to 45 fatalities a day around Christmas and to 54 a day around the New Year's holiday. And from what AAA's annual projections for Thanksgiving travel indicated, this season will be one of the busiest for travel in recent memory.

Therefore, it is important to be educated. According to the Association for Safe International Road Travel (ASIRT)'s Annual United States Road Crash Statistics:

More than 38,000 people die every year in crashes on U.S. roadways. The U.S. traffic fatality rate is 12.4 deaths per 100,000 inhabitants.

- An additional 4.4 million are injured seriously enough to require medical attention.
- Road crashes are the leading cause of death in the U.S. for people aged 1-54.
- The economic and societal impact of road crashes costs U.S. citizens \$871 billion.
- Road crashes cost the U.S. more than \$380 million in direct medical costs.
- The U.S. suffers the most road crash deaths of any high-income country, about 50% higher than similar countries in Western Europe, Canada, Australia and Japan.
- Pedestrian and bicyclist fatalities continue to rise in the United States. According to the National Highway Traffic Safety Administration (NHTSA), more pedestrians and cyclists were killed in 2018 than in any year since 1990.

In addition to CDC guidance, AAA reminds travelers to be aware of local and state travel restrictions, including testing requirements and quarantine orders. See below for their full list of "What to Know Before You Go" this holiday season:

1. **Plan Ahead.** Check with state and local authorities where you are, along your route, and at your planned destination to learn about local circumstances and any restrictions that may be in place.
2. **Follow Public Health Guidance.** Consistent use of face masks combined with social distancing (at least 6 feet) and regular handwashing are the best ways to lower your risk of contracting COVID-19. Be sure to pack face masks, disinfecting wipes, hand sanitizer and a thermometer to help protect and monitor your health. Also pack water and extra snacks to reduce the need to stop along your trip.
3. **Verify Before You Go.** Call ahead to minimize any last minute surprises.
4. **Hotels** – Prior to any hotel stay, call ahead to ensure your hotel is open and ask what precautions they are

taking to protect guests. Ask about social distancing protocols like capacity reductions in common spaces, hotel staff requirements to wear masks at all times and if all amenities are available, like restaurant dining.

5. **Car Rentals** – If renting a car, ask what has been done to clean the vehicle. Hertz, for example, has introduced Hertz Gold Standard Clean, an enhanced vehicle disinfectant and sanitization process. For extra peace of mind, use disinfecting wipes to wipe down door handles, steering wheels, shifters and control panels.

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## What Everyone Should Know Before Hosting a Holiday Party



According to recent reports, this holiday season is set rival pre-pandemic levels of travel to celebrate with family and friends. And if you're someone who prefers to host the party over crashing one, there are a few key things you should keep in mind. Party planners looking to put the "fest" in festivities need to consider guests' safety above all else.

Holiday gatherings usually mean alcohol will be served, and that is where things can get tricky for a host. Entertainers should be aware of the following facts surrounding party liability:

- Forty-four states (including Florida) have enacted liquor liability laws. These laws make it possible for a plaintiff to hold those who serve alcohol to an intoxicated or underage person responsible for any damage or injury caused by these same individuals after they leave the party.
- Liquor liability laws were originally intended to apply to taverns, bars, and other establishments selling and serving alcohol. However, the liability laws have expanded over time to include "social hosts" (i.e. those holding a holiday party in their home or business) in some states giving them some exposure to the risk of liability for serving alcohol.
- The United States Department of Labor states that



holding an office holiday party with improper use of alcohol can make employers vulnerable to liability under tort, workers' compensation, or other laws. If you're throwing a company holiday party, you should first take precautions to prevent any risks and financially protect your business by making sure you have the proper insurance.

- When business owners host a holiday party and serve alcohol as part of the festivities, liquor liability can be covered by their commercial general liability (CGL) policy. However, it is always best to check with your insurance agent or broker first.

When hosting a holiday party for family and friends, it is quite common that there will be guests under the legal drinking age of 21, so here are a few things to keep in mind:

- Florida law imposes a duty on social hosts with regards to the consumption of alcohol by guests. Known as the "Open House Party" law, it is a crime for any person 18 years or older to host an "open house party," which is defined as any social gathering at a home, apartment, etc. if "the person knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at the residence and where the person fails to take reasonable steps to prevent the possession or consumption of the

alcoholic beverage or drug.

- Any person who violates the statute may be charged with a second degree misdemeanor. If the violation results in serious bodily injury or death to the consuming minor, or to a third party as a result of the minor's consumption, the host may be charged with a first degree misdemeanor.
- Florida law ALSO allows a "social host" to be sued by anyone injured as a result of a minor's intoxication (either by alcohol or illegal drugs).

Here are 4 simple tips to ensure you don't get into any trouble when throwing your holiday party this year:

1. Limit alcohol at your holiday party through a ticketing process or onsite bartender.
2. Designate one or two employees to watch employees and ensure that no one is excessively drinking, acting inappropriately or about to drive home while intoxicated.
3. Offer car service or Ubers for employees to utilize at no cost if they are driving home from the party after drinking.
4. No alcohol is to be present in any home, event space where minors are home having a party. Ensure that there is adult oversight at all times. No exceptions!

## Important Takeaways from the 2022 Hurricane Season



What began as one of the quietest hurricane seasons in recent history ended with a one-two punch that few of us could have possibly imagined. After Hurricane Ian devastated Florida's southwest, it then crossed the state, leaving a trail of destruction across Central and Northeast regions that Hurricane Nicole eventually polished off when the storm hit less than six weeks later.

The loss of life from severe weather this past year has been unprecedented, and aside from human toll, the financial impacts are worsening what is already an insurance disaster in the Sunshine State. And while the number of insurance claims filed continues to rise, topping more than 622,000 claims, estimated insured losses stand at more than \$8.7 billion, according to the Florida Office

of Insurance Regulation. Hurricane Ian is now expected to be the largest single insurance industry loss event ever witnessed, with the final bill estimated to be above \$75 billion, according to analysis from Stonybrook Capital. This projection doesn't even account for the added destruction caused by Hurricane Nicole.

**Now is the time to act.**



The 2022 Hurricane Season once again reminds us that storms are unpredictable and pose an increasing risk to unprepared and heavily populated coastal communities. Residents of South Florida are encouraged take this opportunity to review their homeowners insurance policies to ensure coverage for both wind and flood damage. Thousands of Florida residents were shocked to discover their homeowners policy excluded damage from wind or to a roof and even more have learned that their policies do not cover flooding caused by natural disasters. Others found that their policy's deductibles required them to first pay out out-of-pocket costs that far exceed their savings or rainy-day funds.

It is no secret that insurance companies are fleeing the

state, and if your insurance carrier goes out of business, the Florida Insurance Guaranty Association (FIGA) will likely step in. However, the maximum amount FIGA will cover is \$300,000 with special limits applying to (1) damages to structure and contents on homeowners' claims and (2) on condominium and homeowners' association claims. For damages to structure and contents on homeowners' claims the FIGA cap is an additional \$200,000. This is why it is critical to always ensure the viability of your insurance carrier and to check your policy of insurance every year to make sure you are sufficiently covered. Paying for adequate insurance can feel burdensome, but the cost of not having the needed coverage is simply not worth the risk.

## As Snowbirds Return, Pedestrian Safety is Top-of-Mind

*By Michael Pike, Attorney and Managing Partner, Pike & Lustig LLP*



The U.S. Department of Transportation and the Florida Department of Highway Safety and Motor Vehicles (FLHSMV) are in high alert as snowbirds flock back to the Sunshine State. The simple fact is that every person has a right to safely co-exist on the streets with motor vehicles and drivers are responsible for staying alert for pedestrians. With an influx of walkers, cyclists and other vulnerable road users this month, the time is now to review how to keep everyone safe.

According to the National Highway Traffic Safety Administration (NHTSA), in 2020, 6,516 pedestrians were killed in the United States by motorists – an average of 18 pedestrians a day. And in 2021, according to the Governors Highway Safety Association, the number of pedestrian deaths was up 17% from the previous year. Eight hundred and ninety-nine of those pedestrians were killed in the Sunshine State in 2021.

To stay safe on the roads, always keep these tips in mind:

### **Pedestrian Walking Tips:**

- Walk on sidewalks whenever they are available. If one isn't available, walk facing traffic and as far from traffic as possible.
- Pay attention and keep alert at all times. Avoid wearing headphones so that you can hear the traffic and pedestrians around you. Never text or look at your cell phone when crossing the street.
- Whenever possible, cross streets at crosswalks or intersections, where drivers expect pedestrians, and look for cars in all directions, including those turning. If neither are available, locate a well-lit area where you have the best view of traffic. Wait for a gap in traffic that allows enough time to cross safely and watch for traffic as you cross.
- Never enter the street between parked cars. If crossing mid-block cannot be avoided, pedestrians

must yield right of way to vehicles on the roadway.

- Do not cross an intersection diagonally except where and when such crossing is authorized by official traffic control devices.
- Watch for cars entering or exiting driveways or backing up in parking lots.
- Be visible at all times. Wear bright clothing during the day and wear reflective materials or use a flashlight at night. Never assume a driver sees you. Make eye contact with drivers as they approach to make sure you are seen.

Pedestrians should always be alert of all the activity surrounding them to best anticipate any situation that may arise. Never assume a car is going to give you the right of way, even if it's lawfully theirs. Never be an aggressor and always be on the defensive while walking or biking. And if possible, the buddy system is never a bad idea. The rest is up to motorists.

#### Motorist Safety Tips:

- Look out for pedestrians everywhere, at all times. Use extra caution when driving in hard-to-see conditions, such as nighttime or bad weather.
- Slow down and be prepared to stop when turning or

otherwise entering a crosswalk. Never pass vehicles stopped at a crosswalk. There may be people crossing that you can't see.

- Yield to pedestrians and bicyclists in crosswalks – or any area where they are legally crossing the street – and stop well back from the crosswalk to give other vehicles an opportunity to see and stop for the crossing pedestrians.
- Always follow the speed limit, especially slower speed limits in school zones and in neighborhoods where children are present.
- As drivers, you have to be prepared to slow or stop at any time – for emergency vehicles, buses, bicyclists, animals, other motorists slowing to turn, and other situations.
- Be extra cautious when backing up—pedestrians can move into your path.

If motorists fail to yield to pedestrians who are crossing legally, they face a minimum citation of \$164 and three points on their driver license. Worse, they can severely injure someone – even taking their life. Always remember, motorists and pedestrians share the road, so stay alert and keep each other safe.

## In the Community

### Families First of Palm Beach

Pike & Lustig, LLP, is proud to be a supporter and Friend of Families First of Palm Beach County. Partner Daniel Lustig is also a member of the organization's Board of Directors.

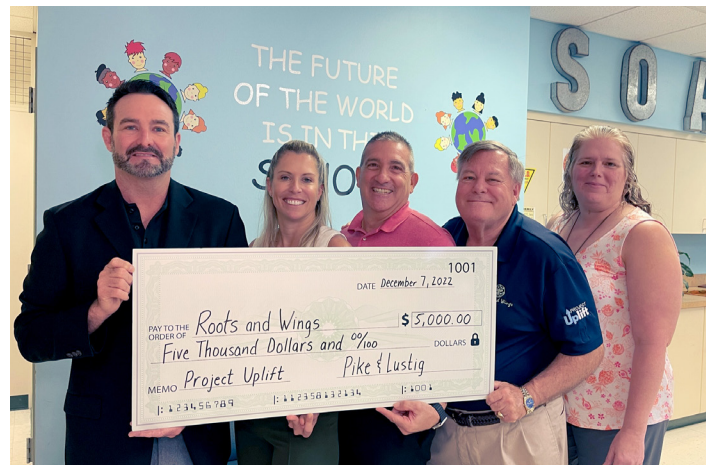


Daniel Lustig was joined by a table full of Pike & Lustig team members at the 16<sup>th</sup> Annual Children's Day Luncheon.

For over three decades, Families First has been providing a hand up to families so they can find their way back to self-sufficiency and provide safe, loving homes for their children. The organization's services are directed toward family strengthening, health, behavioral health, and housing.

## Roots and Wings

Pike & Lustig Awards Roots and Wings \$5,000 Grant for Project Uplift



Michael Pike, Managing Partner, Pike & Lustig, presents \$5,000 check to Ted Hoskinson, Founder of Roots and Wings, and the team at Freedom Shores Elementary School in Boynton Beach, including Principal Michael Sabatino, Assistant Principal Kimberley Rogers, and teacher Jennifer Klisiak. L-R: Pike, Rogers, Sabatino, Hoskinson and Klisiak.

Roots and Wings, a Delray Beach based 501(c)(3) nonprofit organization, received a \$5,000 donation from Pike & Lustig, LLP. The grant was specifically designated for the organization's Project UpLift program, which is dedicated to helping children with reading and reading comprehension skills. Michael Pike, Managing Partner at Pike & Lustig, presented the \$5,000 check, which will provide an afterschool class of second graders, or 10 students, at the Title 1 school with afterschool tutoring.



## Halloween

After a fun day dressing up at the office, some of the Pike & Lustig team spent the evening at Citrus Grove Park in West Palm Beach handing out candy to local trick or treaters!



## Grandma's Place

Pike & Lustig is proud to support Grandma's Place, an emergency shelter for abused & neglected children, which also provides respite care to children.



Managing Partner Michael Pike and his wife, Pamela Pike, attended the 7th Annual Grandma's Angels Holiday Luncheon held on Nov 29 at The Sailfish Club of Florida in Palm Beach. The firm also made a donation to the organization.

## IN THE NEWS

Daniel Lustig, Attorney and Partner at Pike & Lustig, LLP, was featured in South Florida Sun Sentinel's Weekly Forums discussing Golf Cart Safety.





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## Pike & Lustig's Big Wins 2022

### \$80 Million:

#### Pike & Lustig Attorneys Obtain One of the Largest Verdicts in Palm Beach County History

Attorneys Daniel Lustig and Robert "Burr" Johnson represented the parents of a Lake Worth teenager who, in 2017, was killed by a truck while walking to her school bus stop, in a lawsuit against the driver of the truck. The \$80 million jury verdict is one of the largest reached in Palm Beach County history.



#### Pike & Lustig Attorneys Obtain \$23.8 Million Verdict for Construction Laborer Whose Legs Were Trapped and Crushed by Front Loader in 2016

Michael Pike and Robert "Burr" Johnson represented a 22-year-old construction laborer, whose legs were trapped and crushed by front loader in 2016, in eight separate lawsuits against individuals and entities associated with the incident. Pike and Johnson proceeded to trial with the remaining two defendants and a Broward County jury returned a \$23.8 million verdict against them.